STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIMS OF JESSICA L. NEDENS AND ELIJAH SUNDHEIM,	)	Case Nos. 446-2018 and 447-2018
Claimants,	)	
vs.	)	**FINAL AGENCY DECISION**
WILD GINGER, INC., a Montana corporation,	)	
Respondent.	)	

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I. INTRODUCTION

Hearing Officer Caroline A. Holien conducted a hearing in this matter on January 25, 2019 at the Billings Job Service, Billings, Montana. William O'Connor, Attorney at Law, represented Jessica L. Nedens and Elijah Sundheim. James Healow, Attorney at Law, represented Wild Ginger, Inc.

Jessica Nedens; Elijah Sundheim; Hannah D. Herridge; JoAnne Beringer; Tina Wu; Mikal Young; Francisco Marquez; Joe Shade; and Anthony Alfons testified under oath. Nedens documents 1 through 7, 74, 75, 80, 81, 86, and 100 through 114 were admitted into record. Sundheim documents 1 through 9, 140, 141, 143, 144, 145, and 152 through 159 were admitted into the record. Exhibits 301, 302, 303, and A were also admitted. The hearing officer also took judicial notice of the bankruptcy petition filed by Nedens in the United States Bankruptcy Court for the District of Montana on November 12, 2017.

Upon the filing of the parties' proposed findings of fact, conclusions of law and briefs in support on February 19, 2019, the record was closed and the case was deemed submitted. Based upon the evidence and argument adduced at hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether Wild Ginger, Inc., a Montana corporation, owes wages for work performed, as alleged in the complaints filed by Jessica L. Nedens and Elijah Sundheim, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Wild Ginger, Inc., a Montana corporation (Wild Ginger), is a Japanese steakhouse and sushi restaurant located in Billings, Montana. Wild Ginger is owned and operated by Tina Wu. Howard Shen, Wu's husband, serves as an on-site representative for the restaurant.

2. Jessica Nedens worked as a server at Wild Ginger from December 20, 2016 through May 16, 2017. Nedens' hourly rate of pay was $8.15.[1]

3. Elijah Sundheim worked as a server at Wild Ginger from approximately February 23, 2017 through August 18, 2017. See Ex. 153. Sundheim's hourly rate of pay was $8.15.

4. Wild Ginger has a tip sharing policy that required servers working in the hibachi area of the restaurant to pay 8.5% of their gross sales to the hibachi cooks; 2% of their gross sales to the bar staff; and $5.00 each shift to the "sweeper,"[2] who was responsible for cleaning the restaurant at the end of the evening.

5. Servers working in the lounge area, which is separate from the hibachi section, were required to pay 4% of their total sales to the kitchen staff; 2% of their gross sales to the bar staff; and $2.00 each shift to the sweeper.

6. Contributions under Wild Ginger's tip sharing policy were not voluntary. Wild Ginger required servers to share a portion of their tips after each shift in order for the server to continue in his or her employment.

7. Wild Ginger established its tip sharing policy at or near the time it opened for business. Members of Wild Ginger management consulted with area restaurants as to how to best set up their tip sharing policy. Members of Wild Ginger management ultimately decided to base the amount servers were required to share on

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[1] The minimum wage in Montana increased from $8.05/hour to $8.15/hour effective July 1, 2017.

[2] The sweeper during the relevant period of the claims was Xiu Juan Shen, who is Shen's sister.

a percentage of total sales rather than tips reported because it was assumed servers would lie about the amount of their tips if the required sharing amount was based on the server's reported tip amount.

8. Wild Ginger's tip sharing policy also assumed that most customers tip a minimum of 20% of the gross amount of the bill. There was no consideration for the employee if a customer paid less than 20% or no tip at all.

9. At the end of each shift, the servers would get a printout, referred to as a "staff bank," accounting for their total sales for the shift. Each server was required to determine the amount he or she was required to share using the percentages dictated by Wild Ginger management. Each server was required to include a copy of the staff bank with their handwritten notes of how much he or she was required to share along with the money from the server's tips. The server turned over the staff bank and tip money to bar staff, who placed it in a safe in the restaurant.[3]

10. The servers did not typically retain a copy of the staff bank; nor did the employer provide the servers with a copy.

11. If the server did not have enough tips to cover the amount he or she was required to share, the server was required to either cover that amount with their personal money or cover it with tips in their next shift.

12. Wild Ginger did not maintain copies of the servers' staff banks; nor did it maintain any independent records regarding the amounts servers shared under its tip sharing policy.

13. Wild Ginger posted the employee work schedule the week prior to the scheduled shift. Employees were not provided a copy of the work schedule. Employees typically took a picture of the work schedule using their cell phone.

14. Neither party kept records regarding the amounts Nedens and/or Sundheim shared of their total tips during the periods of their wage claims.

15. Nedens and Sundheim typically worked five to six shifts per week.

16. Both Nedens and Sundheim often worked split-shifts, which required them to work between 11:00 a.m. to 2:30 or 3:00 p.m., and 5:30 p.m. to 10:00 p.m. Of the five to six shifts they worked each week, each worked three or four shifts in

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[3] There was no evidence offered to support the allegation that the employer kept all or a part of the tips that servers were required to share under its tip sharing policy.

the hibachi section, which is only open during the evening. The remainder of the shifts were worked in the lounge section.

17. Nedens' gross sales for the period of her wage claim was $45,819.20.[4] See Ex. 303.

18. Nedens worked approximately 21 weeks for Wild Ginger. Nedens' average weekly gross sales was $2,181.87 ($45,819.20 / 21 weeks).

19. Nedens worked approximately four shifts per week in the hibachi section, which was 2/3 or .666 of her worked shifts. Nedens was required to share 10.5% of her gross sales under Wild Ginger's tip sharing policy after each of those shifts. Nedens was required to share a total of $152.58 of the tips she had earned each week while working her hibachi section shifts ($2,181.87 x .666 x 10.5%). Additionally, Nedens was required to share $5.00 of her tips to the sweeper for each of those four shifts for a total of $172.58 each week. Nedens is owed $3,624.18 for the portion of her tips she was required to share while working the hibachi section shifts under Wild Ginger's tip sharing policy ($172.58 x 21 weeks).

20. Nedens was required to share 6% of her gross sales while working in the lounge section under Wild Ginger's tip sharing policy. Nedens worked approximately two shifts per week in the lounge section, which was 1/3 or .333 of her worked shifts. Nedens was required to share a total of $43.60 of the tips she had earned while working her lounge section shifts each week ($2,181.87 x .333 x 6%), as well as $2.00 for each lounge shift, for a total of $47.60 each week. Nedens is owed $999.60 for the tips she was required to share while working the lounge section shifts ($47.60 x 21 weeks).

21. Wild Ginger owes Nedens $4,623.78 for the tips she shared under Wild Ginger's tip sharing policy ($3,624.18 + 999.60).

22. Sundheim's gross sales for the period of his wage claim was $67,289.21. See Ex. 304.

23. Sundheim worked approximately 25 weeks for Wild Ginger. Sundheim's average weekly gross sales was $2,691.57 ($67,289.21 / 25 weeks).

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[4] Neither party provided evidence regarding the amount of tips Nedens and/or Sundheim were required to share under Wild Ginger's tip sharing policy. There was no evidence or argument offered that the gross sales figure used by JoAnne Beringer, CPA, in her damage calculations was incorrect.

24. Sundheim worked approximately four shifts per week in the hibachi section, which was 2/3 or .666 of his worked shifts. Sundheim was required to share a portion of his tips amounting to 10.5% of his gross sales to Wild Ginger's after each of those shifts. Sundheim was required to share a total of $188.22 of the tips he earned while working his hibachi section shifts ($2,691.57 x .666 x 10.5%). Additionally, Sundheim was required to share $5.00 of his tips to the sweeper for each of those four shifts for a total of $208.22 each week. Sundheim is owed $5,205.50 for the tips he was required to share while working the hibachi section shifts ($208.22 x 25 weeks).

25. Sundheim was required to share a portion of his tips amounting to 6% of his gross sales while working in the lounge section. Sundheim worked approximately two shifts per week in the lounge section, which was 1/3 or .333 of his worked shifts. Sundheim was required to share a total of $53.77 of his tips while working his lounge section shifts ($2,691.57 x .333 x 6%), as well as $2.00 for each lounge shift, for a total of $57.77 each week. Sundheim is owed $1,444.25 for the tips he was required to share under Wild Ginger's tip sharing policy ($57.77 x 25 weeks).

26. Wild Ginger owes Sundheim $6,649.75 for the tips he was required to share under its tip sharing policy ($5,205.50 + $1,444.25).

IV. DISCUSSION

A. Wild Ginger's Tip Sharing Policy Violates Montana's Wage Payment Act

The claims for Nedens and Sundheim are for unpaid regular wages. Neither have made claims for minimum wage or overtime pay. As such, their claims are determined under the provisions of the Montana Wage Payment Act (WPA) and not the federal Fair Labor Standards Act (FLSA).

The 9th U.S. Circuit Court of Appeals addressed a USDOL rule disallowing a tip pooling policy but allowing tip splitting agreements made between the employees in *Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2015), rehearing denied by, rehearing, en banc, denied by *Or. Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 2016 U.S. App. LEXIS 16361 (9th Cir., Sept. 6, 2016).[5] The court held:

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[5] A tip pooling policy would be a situation where all the wait staff put all their tips into a pot and receive some percentage back from the employer. Tip splitting would be a voluntary agreement between the wait staff to contribute a set percentage of their tips into a pool for other employees to receive.

> A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, who has the right to determine who shall be the recipient of the gratuity. Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool. Only tips actually received by an employee as money belonging to the employee may be counted in determining whether the person is a "tipped employee" within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips.

29 CFR 531.52.

> Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them, in applying the provisions of section 3(m) and 3(t). Similarly, where an accounting is made to an employer for his information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his tips for purposes of the Act. Section 3(m) does not impose a maximum contribution percentage on valid mandatory tip pools, which can only include those employees who customarily and regularly receive tips. However, an employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

29 CFR 531.54.

Montana law deals directly with the concept of tips and gratuities. The WPA provides the following definition of wages:

> "Wages" includes any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly,

> monthly, or yearly, and includes bonus, piecework, and *all tips and gratuities* that are covered by section 3402(k)[6] and service charges that are covered by section 3401 of the Internal Revenue Code of 1954, as amended and applicable on January 1, 1983, received by employees for services rendered by them to patrons of premises or businesses licensed to provide food, beverage, or lodging.

Mont. Code Ann. § 39-3-201(6)(a) (emphasis added).

A plain reading of the statute makes clear that Nedens' and Sundheim's tips were those to do with what they wished. *See MM&I, LLC v. Bd. of County Comm'rs of Gallatin County,* 2010 MT 274, P44; 246 P.3d 1029, 1036 (In discerning the plain meaning, the words used shall be reasonably and logically interpreted, so as to give them their usual and ordinary meaning). Further support for such a conclusion can be found at Admin. R. Mont. 24.16.1508(1)(b), which provides, "tips are the employees to keep and may not be used to make up any part of the employee's wage." Admin R. Mont. 24.16.1508.[7]

While tips left for a server are the server's alone to do with as he or she wishes, tip pools or tip sharing agreements are not prohibited under Montana law. Admin. R. Mont. 24.16.1508(1)(c) provides:

> Tips may be distributed pursuant to a valid tip pool agreement. A tip pool agreement for the purpose of distribution of tips is valid only where voluntarily entered into by employees without the involvement of management. Employees must first determine whether to enter into a tip pool agreement, and if so, the details of that agreement. Where a valid tip pool agreement has been created, management may enforce the agreement.

Wild Ginger argues its tip sharing policy is lawful and points to *Etheridge v. Reins Int'l California, Inc.*, 172 Cal. App. 4th 908, 91 Cal. Rptr. 3d 816 (Cal. App. 2009). In *Etheridge*, the court engaged in a lengthy discussion regarding tip credits and tip pooling under California labor law. Under California law, as in Montana, tips are considered "to be the sole property of the employee or employees to whom it was paid, given, or left for." *See Etheridge*, 172 Cal. App. 4th at 917. The *Etheridge* court

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[6] Section 3402(k) requires a certain percentage of a server's tips be reported as wages for tax purposes.

[7] The hearing officer notes that this rule was promulgated under the authority of Mont. Code Ann. § 39-3-403 which is the Minimum Wage and Overtime Act.

ultimately found that requiring a server to contribute a portion of his tips to a tip pool was not an improper taking of the server's personal property when the tips were shared amongst those who contributed to the patron's service. *Etheridg*e, 172 Cal. App. 4th at 923. The ruling in *Etheridge* was based upon the assumption that a patron who leaves a tip intends that tip to be shared amongst those individuals involved in the "chain of service." *Id.* at 921-22.

However, a different conclusion based upon a similar set of facts was reached by the district court in *Shadow's Keep of Missoula, Inc., a Montana corporation d/b/a The Keep Restaurant v. Amy Graham,* Cause No. DV-17-504 (filed Sept. 14, 2017). In that case, the server was allowed to keep only 67% of her tips and was required to "tip-out" the remaining 33% to cooks, dishwashers, bartenders, and bussers. *Id.* at p. 2. The district court held that The Keep's mandatory "tip-pooling" policy violated the WPA because "it was an involuntary policy created by the employer requiring servers . . . to share and distribute tips with other non-tipped employees and managers." *Id*. at p. 7. The district court noted that tips left by customers are wages under Mont. Code Ann. § 39-3-201(6)(a) and Admin. R. Mont. 24.16.1508. *Id.* at p. 6. "Montana law is clear: an employer does not have any legitimate right to control the tips an employee receives from a customer. Once a tip is left behind by the customer, that tip is the property of the employee who receives it." *Id.*

The district court rejected the employer's argument that the server agreed to the policy when she accepted employment with The Keep. *Id.* at p. 7. The court reasoned, "Moreover, even if Graham's acceptance of a server job at The Keep could be construed as an 'agreement,' the agreement would be 'unlawful and void' because it 'evade[s], or circumvent[s] the Montana Wage Protection Act'." *Id.* at pp. 7, 8 (citing Mont. Code Ann. § 39-3-208).

Mikal Young, Bar Manager, testified that, prior to the opening of Wild Ginger, she and others talked with servers and other staff at the owner's other restaurant, Asian Sea Grill, to determine how best to set up a tip sharing policy so there was a fair allocation of tips amongst the entire staff. Young testified the policy employed during the period of the claims of Nedens and Sundheim was the agreed upon approach, which she contended allowed for a fairer distribution of tips and prevented servers from lying about their tips in an effort to avoid sharing them with staff. Young conceded that since the filing of Nedens' and Sundheim's claims, Wild Ginger has implemented a written tip sharing policy that servers are required to sign.

Francisco Marquez, server and Floor Manager, testified he typically talks about the tip sharing policy during the interview of any prospective employee. Both Nedens and Sundheim contend they only learned of Wild Ginger's tip sharing policy at the conclusion of their first shift. Hannah Herridge, who also worked as a server

for Wild Ginger, testified she was told about Wild Ginger's tip sharing policy during her training. All three testified they were required to share a portion of their tips at the rates dictated by the employer regardless of the tips they actually received during any shift. All three testified they felt their employment would be in jeopardy if they refused to share a portion of their tips as directed by management.

Wild Ginger argues the hearing officer should draw a negative inference from Nedens' failure to disclose her wage claim during her bankruptcy proceedings. Wild Ginger's argument has some merit. See Mont. Code Ann. § 26-1-303(3) ("a witness false in one part of the witness's testimony is to be distrusted in others"). However, the hearing officer is more prepared to forgive Nedens for what appears to have been an oversight than the fact that Wild Ginger appears to have been paying some of their employees, or at least Hibachi Chef Anthony Alfons, under the table using tips earned by other employees. Given the apparent indifference of Wild Ginger to maintaining proper payroll records, the hearing officer is not prepared to dismiss the testimony of Nedens, which was clear, direct, and consistent, as not being credible. Therefore, Wild Ginger's argument that the testimony of Nedens and Sundheim is less credible than the evidence it presented is rejected. It is therefore determined that the testimony of Nedens and Sundheim is determined to be more credible than the evidence presented by Wild Ginger.

The evidence shows the tip sharing policy employed by Wild Ginger was a creation of management at or near the time it opened for business. While other servers may have voluntarily shared a portion of their tips, Nedens and Sundheim have shown their participation was not, in fact, voluntary. Rather, the evidence shows their continued employment with Wild Ginger was contingent upon their adherence to Wild Ginger's tip sharing policy. Both Nedens and Herridge credibly testified that members of Wild Ginger management told them they would not be allowed to continue working for Wild Ginger if they failed to share their tips at the amounts dictated by the employer. Nedens testified that Howard Shen himself accused her of stealing from him when she failed to share her tips at the amount dictated by the employer.

Given the detailed and convincing testimony of Nedens and Herridge, as well as Sundheim, Wild Ginger's contention that the participation of Nedens and Sundheim under its tip sharing policy was voluntary is unpersuasive. Further, as noted by the district court in *The Keep*, neither Nedens or Sundheim could be found to have entered into any tip sharing agreement that was unlawful and void. It is therefore determined that Wild Ginger's tip sharing policy violates the WPA. *See* Admin. R. Mont. 24.16.1508(1)(c).

B. Both Nedens and Sundheim Have Shown Wild Ginger Owes Them Wages for Work Performed During the Period of Their Wage Claims

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to "show the extent and amount of work as a matter of just and reasonable inference." *Id.* at 189, 562 P.2d at 476-77, citing *Anderson*, 328 U.S. at 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; see also, *Marias Health Care Srv. v. Turenne,* 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding the lower court properly concluded the plaintiff's wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract). As the Montana Supreme Court has long recognized, it is the employer's duty to maintain accurate records of hours worked, not the employee's. *Smith v. TYAD, Inc.*, 2009 MT 180, ¶46, n.3, 351 Mont. 12, 209 P.3d 228.

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "'the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee, and if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation' . . . ." *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, quoting *Purcell v. Keegan*, supra, 359 Mich. at 576, 103 N.W. 2d at 497.

Neither party provided adequate records documenting the tip amounts Nedens and Sundheim shared under Wild Ginger's tip sharing policy during the periods of their wage claims. In an analogous case, the Montana Supreme Court provided guidance as to the analysis required when neither party has maintained adequate records of an employee's hours. In *Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, 378 Mont. 324, 343 P.3d 1222 (2015), the court held overtime hours claimed by an employee may be reduced to the extent supported by credible evidence offered by the employer but not reduced below the amount established by the employee. The court reasoned:

> In short, when an employer has failed to maintain adequate records of an employee's hours, it is expected that the employee will not be able to offer convincing substitutes for the employer's records. Moreover, whatever evidence the employee does produce can be expected to be 'untrustworthy'. The solution in such situations, however, is not to

penalize the employee for his inability to accurately prove his hours by denying his claims in their entirety.

Arlington, 378 Mont. 324, 331, 343 P.3d 1222, 1229.

Nedens and Sundheim called JoAnne Beringer, C.P.A., as an expert witness to establish their damages in this case. Beringer prepared two summaries (Exs. 303 and 304) that included the gross sales of both Nedens and Sundheim and calculated their damages using a 10.5% tip sharing contribution and a $5.00 sweeper contribution. Beringer concluded that Nedens was owed $5,336.02 in unpaid wages and Sundheim was owed $8,915.37 in unpaid wages.

Both Nedens and Sundheim testified that they did not always work in the hibachi section, which required the 10.5% contribution, but that they also worked in the lounge section, which required the 6% contribution. Given that neither party provided evidence specifically detailing the shifts worked in each section, the hearing officer was left to rely on Nedens' testimony that she typically worked four shifts each week in the hibachi section and two shifts each week in the lounge section. Wild Ginger offered no substantial and credible evidence negating the reasonableness of the information provided by either Nedens or Sundheim.

Nedens has shown by a preponderance of the evidence that Wild Ginger owes her $4,623.78 in unpaid wages for the amount of her tips she was required to share under its tip sharing policy. Similarly, Sundheim has shown by a preponderance of the evidence that Wild Ginger owes him $6,649.75 in unpaid wages for the amount of his tips he was forced to share under its policy.

C. Wild Ginger is subject to a 55% penalty

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. Imposition of the penalty is mandatory. *Id.* Admin. R. Mont. 24.16.7566 provides:

> (1) For determinations involving claims filed on or after October 1, 1993, if none of the special circumstances of ARM 24.16.7556 apply, penalties are calculated as follows:
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> (a) a penalty equal to 55% of the wages determined to be due to the employee will be imposed in all determinations issued by the department; but
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> (b) the department will reduce the penalty to 15% of the wages determined to be due if the employer pays the wages found due in the time period specified in the determination as well as a penalty equal to 15% of that amount.

The Wage and Hour Unit dismissed the claims of Nedens and Sundheim. As such, there has been no determination finding Wild Ginger owed either unpaid wages. Therefore, a penalty of 15% is appropriate in this case if the wages found owing are paid within 30 days. If Wild Ginger chooses not to pay the wages found owing within 30 days of the date of this decision, then a penalty of 55% will be imposed amounting to $2,543.08 in Nedens' case and $3,657.36 in Sundheim's.

In addition to the $4,623.78 found to be owing to Nedens, Wild Ginger is subject to a penalty of $693.57, for a total of $5,317.35. In addition to the $6,649.75 found to be owing to Sundheim, Wild Ginger is subject to a penalty of $997.46 for a total of $7,647.21.

D. Wild Ginger's Affirmative Defenses of Equitable Estoppel and Laches Must Fail

Wild Ginger argues the claims of Nedens and Sundheim should be barred based upon the doctrines of equitable estoppel and laches. The Montana Supreme Court considered the doctrine of equitable estoppel in *Turner v. Wells Fargo Bank, N.A.*, 366 Mont. 285, 293 291 P.3d 1082, 1089 (2012). In *Turner,* the court outlined the six elements a party asserting equitable estoppel must establish:

> (1) the existence of conduct, acts, language, or silence amounting to a representation or a concealment of a material fact; (2) these facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him; (3) the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him; (4) the conduct must be done with the intention, or at least the expectation, that it will be acted upon by the other party, or under circumstances both natural and probable that it will be so acted upon; (5) the conduct must be relied upon by the other party and, thus relying, he must be led to act upon it; and (6) he must in fact act upon it in such a manner as to change his position for the worse.

Id.

Wild Ginger appears to be arguing that it detrimentally relied upon the conduct of Nedens and Sundheim in performing work under its tip sharing policy despite their apparent intention to later repudiate their participation under its tip sharing policy. Wild Ginger essentially argues that it would never have hired Nedens and/or Sundheim if it had known that either of them had intended to challenge its tip sharing policy.

The Montana Supreme Court has found that "[e]quitable estoppel is a principle of equity used to promote justice, honesty, fair dealing and to prevent injustice; the object of equitable estoppel is to prevent a party from taking advantage of his own wrong while asserting his strict legal right." *State ex rel. Farm Credit Bank v. District Court of the Third Judicial Dist.*, 267 Mont. 1, 33, 881 P.2d 594, 613 (1994) (internal citations omitted). Equitable estoppel is not favored and will only be sustained upon clear and convincing evidence. *Id.* citing *Berglund and Berglund, Inc. v. Contributions Bureau, Unemployment Ins. Div., Montana State Dept. of Labor and Industry* (1990), 241 Mont. 49, 784 P.2d 933. "[Equitable estoppel] involves an element of falsehood or fraud both of which are abhorred by the law, and is applied to protect a person from loss or damage in consequence of reliance placed upon the representations or inducements made by another by acts or words." *Waddell v. School Dist.*, 74 Mont. 91, 97, 238 P. 884, 886 (1925). "'It is elementary that before anyone can invoke the doctrine, he must show that he was misled to his prejudice by the conduct of which he complains'." *Id.* (internal citations omitted).

Wild Ginger has failed to show by clear and convincing evidence that Nedens and Sundheim accepted the employment with Wild Ginger with the intention to later repudiate their participation under its tip sharing policy. It strains the limits of credulity that a worker in the service industry, particularly one whose financial position was so precarious as to require her to file for personal bankruptcy, would seek employment with the sinister purpose of inducing an unsuspecting employer to not only hire them but to also rely upon them to perform their work at an acceptable level to ensure that the employer's business experienced continued success. It is difficult to see where the detrimental reliance exists unless Wild Ginger is contending that it was free to act contrary to law so long as everyone agreed to continue participating in the scheme with no questions being asked. Wild Ginger's argument that the doctrine of equitable estoppel bars the claimants from pursuing their claim under Montana law is not convincing.

Similarly, Wild Ginger's argument that the doctrine of laches bars the claims of Nedens and Sundheim is unconvincing. In *Adair v. Capital Invest. Co.*, 525 P.2d 548, 550, the Montana Supreme Court explained the doctrine of laches:

> Laches, considered as a bar independent of the statute of limitations, is a concept of equity; it means negligence in the assertion of a right; it is the practical application of the maxim, 'Equity aids only the vigilant'; and it exists when there has been unexplained delay of such duration or character as to render the enforcement of the asserted right inequitable. Therefore has it often been held by this court that: While a mere delay short of the period of the statute of limitations does not of itself raise the presumption of laches [citing cases], yet 'good faith and reasonable diligence only can call into activity the powers of a court of equity, and,

> independently of the period fixed by the statute of limitations, stale demands will not be entertained or relief granted to one who has slept upon his rights. Considerations of public policy and the difficulty of doing justice between the parties are sufficient to warrant a court of equity in refusing to institute an investigation where the lapse of time in the assertion of the claim is such as to show inexcusable neglect on the part of the plaintiff, no matter how apparently just his claim may be; and this is particularly so where the relations of the parties have been materially altered in the meantime.' [citing cases]. What constitutes a material change of condition has been the subject of much judicial discussion . . .

Id. (internal citation omitted).

Nedens separated from her employment with Wild Ginger on May 16, 2017; and Sundheim separated on August 18, 2017. They each filed their claims on September 14, 2017, which was well within the 180 days provided for under Mont. Code Ann. § 39-3-207(1). It can hardly be said that either Nedens or Sundheim rested on their rights or the lapse of time was so great as to constitute inexcusable neglect on their parts. Further, it is difficult to see how there was a material change of condition experienced by either party other than Wild Ginger benefitted the work of both Nedens and Sundheim and then denied them a portion of the monies they had earned as a result of their labor. Therefore, Wild Ginger's argument that the doctrines of equitable estoppel and/or laches bars the claims of Nedens and Sundheim is rejected.

E. The Bankruptcy Trustee is not a Party to Nedens' Wage Claim

Wild Ginger argued that Joe Womack, Bankruptcy Trustee for the United States Bankruptcy Court for the District of Montana, was the real party in interest as a result of Nedens having petitioned for bankruptcy. Having not previously encountered such an issue, the hearing officer asked for argument from both parties as to how she should proceed. Counsel for Nedens and Sundheim produced an order from the Bankruptcy Trustee employing him as legal counsel authorized to act on behalf of the Bankruptcy Trustee. Counsel suggested the Bankruptcy Trustee be included in the caption. No objection having been offered, the hearing officer requested counsel to draft a proposed caption. Neither party did so.

The hearing officer has considered the parties' respective arguments. Mindful of the Bankruptcy Trustee's authority to act on any judgment ordered in this matter, the hearing officer is not prepared to identify him as a party to the action.

The WPA provides:

> "[E]very employer of labor in the state of Montana shall pay to each employee the wages earned by the employee in lawful money of the United States or checks on banks convertible into cash on demand at the full face value of the checks, and a person for whom labor has been performed may not withhold from any employee any wages earned or unpaid for a longer period than 10 business days after the wages are due and payable . . ."

Mont. Code Ann. § 39-3-204(1). As noted above, Mont. Code Ann. § 39-3-206(1) defines wages as "any money due an employee from the employer . . . ."

Nedens is an employee who has money due her from her former employer, Wild Ginger. The policy of the WPA is to protect and to aid employees in the prompt collection of compensation due and to discourage an employer from using a position of economic superiority as a level to dissuade an employee from promptly collecting his [or her] agreed upon compensation . . . ." *Delaware v. K-Decorators, Inc.*, 1999 MT 13, ¶33, 293 Mont. 97, 105, 973 P.2d 818, 824 (internal quotation and citation omitted). Given that it is Nedens' personal right to collect the monies owed to her for work performed, the hearing officer will not alter the caption to include the Bankruptcy Trustee as a party. Doing so, in the hearing officer's opinion, would be contrary to the intent and to the purpose of the WPA. The hearing officer is confident Nedens is aware of and understands her duty under the bankruptcy petition and her counsel will assist her in faithfully executing that duty.[8]

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Wild Ginger, Inc., a Montana corporation, owes Jessica L. Nedens $4,623.78 in unpaid wages. Mont. Code Ann. § 39-3-204.

3. Wild Ginger, Inc., a Montana corporation, owes a penalty of 15% on the unpaid wages owed to Nedens amounting to $693.57. Admin. R. Mont. 24.16.7566.

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[8] The hearing officer has taken judicial notice of the Bankruptcy Trustee's order appointing William J. O'Connor, II, and the law firm of O'Connor & O'Connor, PC, as legal counsel.

4. Wild Ginger, Inc., a Montana corporation, owes Elijah Sundheim $6,649.75 in unpaid wages. Mont. Code Ann. § 39-3-204.

5. Wild Ginger, Inc., a Montana corporation, owes a penalty of 15% on the unpaid wages owed to Sundheim amounting to $997.46. Admin. R. Mont. 24.16.7566.

VI. ORDER

IT IS HEREBY ORDERED that Wild Ginger, Inc., a Montana corporation, shall tender a cashier's check or money order in the amount of $5,317.35 representing $4,623.78 in monies owed and $693.57 in penalty, made payable to Jessica L. Nedens and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision. Wild Ginger, Inc., a Montana corporation, may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

IT IS FURTHER ORDERED that Wild Ginger, Inc., a Montana corporation, shall tender a cashier's check or money order in the amounts of $7,647.21 representing $6,649.75 in monies owed and $997.46 in penalty, made payable to Elijah Sundheim and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision. Wild Ginger, Inc., a Montana corporation, may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

IT IS FURTHER ORDERED that should Wild Ginger, Inc., a Montana corporation, fail to pay the amounts due and owing to the claimants within the 30 days provided for under this decision, a penalty of 55% will be imposed. Admin. R. Mont. 24.16.7566(1)(a).

DATED this 11th day of April, 2019.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702. Please send a copy of your filing with the district court to:

Department of Labor & Industry
Wage & Hour Unit
P.O. Box 201503
Helena, MT 59620-1503

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.